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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 806

GUSTAVE B. GARFIELD, PETITIONER

v.

EDMUND PALMIERI, UNITED STATES DISTRICT JUDGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (C.A. App. 16a–22a)[1] is reported at 193 F. Supp. 137. The opinion of the Court of Appeals (Pet. App. 21–23) is reported at 297 F. 2d 526.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1962. The petition for a writ of certiorari was filed on March 21, 1962. The jurisdiction

[1] "Citations to "C.A. App." refer to the Appendix to Appellant's Brief in the court below, a copy of which is on file with the Clerk of this Court.

of this Court is invoked under 28 U.S.C. 2101(c), but should have been invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal district judge may be subjected to a civil action for libel based upon his transmission of a copy of an opinion containing an allegedly defamatory statement for publication in the Federal Supplement.

STATEMENT

This is an action for libel, brought by petitioner in the Supreme Court of the State of New York against respondent, a United States District Judge for the Southern District of New York. The gravamen of the complaint was that respondent, "acting unofficially and privately in his individual capacity, and when no matter was then *sub judice* before him, maliciously and with actual malice and with intent to permanently degrade, and injure the plaintiff in the practice of his profession and to bring shame upon plaintiff in his said profession, published, and advised, induced, procured, and aided and abetted in the publication" by the West Publishing Company in the Federal Supplement of an opinion of respondent containing a "false and defamatory statement" concerning petitioner (C.A. App. 31a). The suit was removed to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. 1442 (Pet. App. 22).

The circumstances giving rise to the charge of defamation were as follows. Petitioner was attorney for the plaintiff in a civil antitrust suit (*Fleischer v. A.A.P., Inc.*) being tried before respondent. Dur-

ing oral argument, counsel for one of the defendants stated that the Court of Appeals for the Second Circuit had "rebuked" petitioner in an opinion rendered on an earlier appeal in the case, when it had said that certain statements made on behalf of petitioner's client were "unjustified and unworthy." *Fleischer* v. *Phillips*, 264 F. 2d 515, 518, certiorari denied, 359 U.S. 1002. When petitioner objected, stating that the appellate court's remark had been directed to petitioner's client and not petitioner, respondent stated his belief that it was petitioner himself who had been rebuked.

Petitioner then submitted an application for respondent's disqualification from further consideration of the merits of the case before him; respondent indicated orally his intention to deny this application. Subsequently, respondent filed an opinion dismissing plaintiff's cause of action as being barred by the statute of limitations. In this opinion, respondent also dealt with the application for his disqualification. After setting forth the circumstances leading up to the application, including the fact that he had stated his "belief that counsel [*i.e.*, petitioner] had been rebuked" by the court of appeals, respondent denied the application for disqualification, stating his reasons.

Approximately seven months after respondent's written opinion had been filed as a part of the official record in the *Fleischer* case, the West Publishing Company wrote respondent and informed him that an opinion by another judge which it was preparing for publication had referred to his as-yet unreported opinion in the *Fleischer* case (C.A. App. 9a). West requested a copy of respondent's opinion for publication

in the Federal Supplement, indicating that it wished to be able to give a definite volume and page reference for respondent's opinion in the publication of the other opinion. Respondent complied with this request, and his opinion was subsequently reported at 180 F. Supp. 717. It is this transmission for publication, and this publication of the statement in respondent's opinion that he believed petitioner had been rebuked by the court of appeals, 180 F. Supp. at 720, on which the present suit is based.

Prior to instituting the present suit, petitioner brought an action in the United States District Court for the Eastern District of New York in which he sought to have the allegedly defamatory portions of respondent's opinion expunged from the records of the United States District Court for the Southern District of New York. The complaint was dismissed by the district court on the grounds that respondent had jurisdiction to pass on the motion to disqualify himself and that federal judges are absolutely immune from civil actions arising out of their judicial acts. *Garfield* v. *Palmieri*, 193 F. Supp. 582. The court of appeals affirmed, 290 F. 2d 821, and this Court denied certiorari, 368 U.S. 827.

While the suit to expunge the allegedly defamatory material from the official record was pending before the court of appeals, petitioner instituted the present suit for libel. Petitioner did not contend that the writing and filing of the opinion as a part of the court's official records constituted actionable libel. Rather, he asserted that the "republication" of this opinion in the Federal Supplement is not within the

absolute judicial immunity from liability, because the "republication" in the West reporter system is not an official function of a federal judge. In support of this contention, petitioner relied primarily on the decision of the New York Court of Appeals in *Murray* v. *Brancato*, 290 N.Y. 52, 48 N.E. 2d 257.

The district court, while noting that respondent "stoutly maintain[s] that nothing in the opinion is false or untrue or was written or published with any malice or intent to injure or degrade" petitioner (C.A. App. 14a), granted respondent's motion for summary judgment on the ground that respondent, in sending the opinion to the West Publishing Company, "was acting well within the scope of his powers, duties and authority as a Federal Judge" and that, accordingly, he was "protected by an absolute privilege against civil liability for statements made in his opinion" (C.A. App. 17a–18a). The court of appeals affirmed *per curiam* (Pet. App. 21).

ARGUMENT

The decisions below are plainly correct. The basic issues involved—whether the respondent was acting in an official judicial capacity when he transmitted his opinion to the West Publishing Company and whether he is therefore protected by an absolute judicial immunity against civil suit for such transmission—have been fully canvassed and decided in respondent's favor by two courts, not only in this proceeding but in petitioner's suit to expunge the challenged language from the official records as well, *Garfield* v. *Palmieri*, 193 F. Supp. 582 (E.D.N.Y.), affirmed, 290 F. 2d 821

(C.A. 2), certiorari denied, 368 U.S. 827. There is no warrant for further review.

1. There can be no question but that respondent's claim of absolute immunity from liability in a civil suit arising from his actions as a federal officer must be determined by federal, and not state law.[2] As this Court held in *Howard* v. *Lyons*, 360 U.S. 593, 597, "[n]o subject could be one of more peculiarly federal concern, and it would deny the very considerations which give the rule of privilege its being to leave determination of its extent to the vagaries of the laws of the several States."

2. It is equally well-settled that "judges of courts of superior or general authority are absolutely privileged as respects civil suits to recover for actions taken by them in the exercise of their judicial functions, irrespective of the motives with which those acts are alleged to have been performed * * *." *Barr* v. *Matteo*, 360 U.S. 564, 569. See also *Bradley* v.

[2] Even if New York law is applicable, *Murray* v. *Brancato*, *supra*, the decision of the New York Court of Appeals on which petitioner relies, is readily distinguishable from the present situation. The State of New York had established a Law Reporting Bureau which was responsible for selecting and publishing in the official state reporter the opinions of the lower courts. The defendant judge in the *Murray* case sent the allegedly defamatory opinions to two unofficial reporters and requested that they publish the opinions. Here, however, respondent transmitted his opinion to West at the request of West, in which request West indicated that the opinion was required because of its precedential value in another case. See pp. 3–4, *supra*. Moreover, as the district court below noted, it is the normal routine practice *for federal district judges to send* copies of their opinions to West for publication, 193 F. Supp. at 143. Compare *Bradford* v. *Pette*, 204 Misc. 308 (Sp. Term), appeal dismissed, 285 App. Div. 960, 139 N.Y.S. 2d 907.

Fisher, 13 Wall. 335; *Randall* v. *Brigham*, 7 Wall. 523; *Alzua* v. *Johnson*, 231 U.S. 106, 111; *Brietson* v. *Woodrough*, 164 F. 2d 107 (C.A. 8); *Gregoire* v. *Biddle*, 177 F. 2d 579 (C.A. 2); *Meredith* v. *Van Oosterhoudt*, 286 F. 2d 216 (C.A. 8), certiorari denied, 365 U.S. 835; *Sauber* v. *Gliedman*, 283 F. 2d 941 (C.A. 7), certiorari denied, 366 U.S. 906; *Martin* v. *Wyzanski*, 191 F. Supp. 931 (D. Mass.). This Court has regarded this judicial privilege as a full "exemption from civil action," designed to prevent all need for judges to vindicate their official acts in private litigation, to the end that their independence of judgment will not be influenced by personal considerations. See *Randall* v. *Brigham*, *supra*, 7 Wall. at 536.

The policy that a "judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself," *Bradley* v. *Fisher*, *supra*, 13 Wall. at 347, is fully applicable to the present case. For if a federal judge is subject to civil suits because he has permitted one of his judicial opinions to be reported nationally, then his freedom to express his judgments and to discharge his duties in deciding cases may be seriously curtailed.

3. Nor can it be seriously disputed that respondent's compliance with the West Publishing Company's request that he transmit a copy of his opinion for publication was a judicial function essential to the orderly administration of justice and consequently *within the* absolute judicial immunity from liability. As Judge Bryan well stated, 193 F. Supp. at 143:

> There are no official published reports of the opinions of the federal district courts. The Federal Supplement published by West, as a part of its reporter system, furnishes the only comprehensive compilation of such opinions and is recognized as authoritative by the courts and the profession. In a system of law based on stare decisis it is not enough that opinions of the court be available only to litigants and their counsel. It is essential that such opinions be readily accessible to the legal profession generally and to the courts for purposes of research, citation and general information as to the state and development of the law, as well as to others who may wish to refer to them. The sound and efficient administration of federal justice requires that such publication in a reporter system of the nature of the Federal Supplement be unfettered. This is in the interest not only of litigants, the legal profession and the courts themselves, but of the public generally. Such unfettered publication is a matter of public policy and outweighs and overrides any injury to an individual which might result from the application of such a rule.

Similarly, the court of appeals observed that the "vital responsibilities" of federal judges "include duties in the administration of justice as well as in the deciding of cases," a necessary part of which must be cooperation in the reporting of their opinions in the sources upon which "Bar and Bench alike rely," 297 F. 2d at 527.[3]

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[3] There is another and independent reason why this suit must fail. When respondent filed his opinion with the clerk of the court, it became a part of the official record of the

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

WILLIAM H. ORRICK, JR.,
Assistant Attorney General.

ALAN S. ROSENTHAL,
EDWARD A. GROOBERT,
Attorneys.

APRIL 1962.

Fleischer case and a public record. Thereafter, the opinion was freely available to any member of the public, including the West Publishing Company, who might wish to copy it or to obtain a copy from the clerk.

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